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ABSTRACT

This monograph briefly examines justice in the United States as it has evolved historically in four areas: (1) the right to vote; (2) the right to freedom of expression and freedom of the press; (3) the rights of persons accused of crimes; and (4) the right to equal protection under the law. Each area is analyzed. Historical background information and constitutional case studies and their effect are contained in each chapter. The intention of the booklet is not to provide a comprehensive history; rather the booklet offers insights regarding several fundamental principles of a democratic society. (Author/JR)

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In Search of Justice

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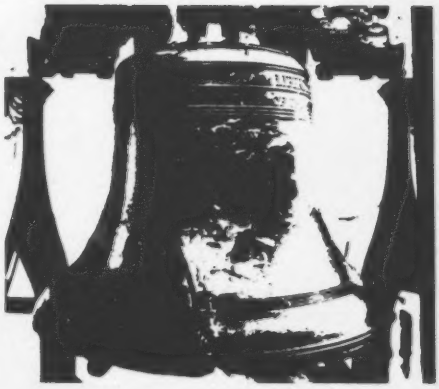

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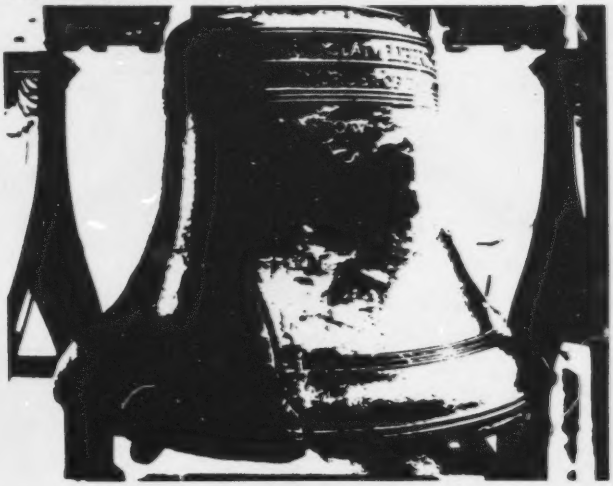
"Justice is truth in action."

Benjamin Disraeli—Speech before House of Commons, March 19, 1838



Introduction

Two centuries ago, our forefathers banded together to declare their independence from the throne of England. They considered British rule of the colonies to be unjust because of laws such as the Sugar Act of 1764, the Stamp Act of 1765, the Townshend Duties of 1767, and the Coercive Acts of 1774.

The first three of these laws were taxes designed to help the British government pay the high cost of protecting and governing the colonies. The Coercive Acts were intended to punish the colonists for refusing to pay those taxes. For example, they closed the port of Boston to trade until the colonists paid damages arising from the Boston Tea Party. The acts also cancelled Massachusetts' charter, provided for trial of her officials in England rather than in the colony, replaced elected officials with those appointed by the British, and provided for the quartering of British troops in public inns.

The colonists resented these laws bitterly, charging that they not only taxed them without providing them representation in Britain's Parliament, but that they also instituted tyrannical rule in the colonies. They soon came to believe that independence from England was the only way to

guarantee justice for themselves and future generations of Americans.

As the Founding Fathers wrote it, the Declaration of Independence was a catalogue of the injustices perpetrated by the British crown upon the colonies. It detailed 27 separate complaints. Among other things, it accused the British of stationing standing armies in the colonies during peacetime, waging war against them, dissolving their legislatures, and cutting them off from trade with much of the rest of the world.

It also accused the British of interfering with the government of the colonies by obstructing the working of colonial laws, taxing the colonists without their consent, denying them trial by jury and other rights guaranteed to British subjects, quartering British troops among them, and making the British military authority superior to colonial civil authority.

The Declaration finally stated that the British government was guilty of ignoring colonial pleas for redress of these and other grievances detailed in the Declaration. For this reason, the colonies declared themselves free and independent of Great Britain.

The Declaration led, after five long years of war with the mother country, to the creation of the U.S. Constitution. That document put flesh on the bones of the cry for justice so eloquently voiced in the Declaration itself. More important, it launched the young United States on a search of justice that has been pursued to the present day.

It is with the evolution of this search throughout American history that this booklet is concerned. In its pages we will examine justice as it has evolved in four areas: (1) the right to vote, (2) the right to freedom of expression and freedom of the press, (3) the rights of persons accused of crimes, and (4) the right to equal protection of the laws. While it is impossible to provide but a glimpse of this evolution in the few pages which follow, it is hoped that the booklet offers some insights and food for thought regarding several fundamental principles of our democratic society.

The two centuries since the signing of the Declaration of Independence are filled with the stories of those who have been forced to fight long and hard to gain justice for themselves within our system. As they have struggled—and partly because of their struggle—our system of laws has evolved and changed so as to provide greater justice for all Americans.

The stories of these people are the true stuff of our history. They show our system with all its faults and all its virtues. But more important, they demonstrate that we can make progress in our search for equal justice.

"Where the annual elections end, there slavery begins."

John Adams—*Thoughts on Government*

Justice and the Right to Vote

For many Americans, one aspect of the new U.S. Constitution must have been a major disappointment. It did not give them the right to vote.

Actually, the new Constitution said little that was specific about who could and could not vote. Instead, it said, in Article I, Section 2, that "the electors (voters) in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." In other words, those qualified to vote in state elections were automatically qualified to vote in national elections. That left the determination of voter qualifications up to the individual states.

It may seem strange today that the Founding Fathers were not more specific about the right to vote. But it should be remembered that the move toward union of the states was opposed in many quarters on a wide variety of grounds.

At the time the Constitution was written, more than one state feared that a national government would deprive it of the right to determine its own affairs. Some states viewed voting qualifications as an area in which the national government had no business meddling.

In a very real sense, the hands-off attitude toward voting by the men who wrote the Constitution was a compromise. By mentioning the right to vote and then leaving voter qualifications up to the states, the Framers of the Constitution could say they had fulfilled their obligation in establishing the right to vote. The states could not object that their right to determine voter qualifications had been violated. After all, they were only being required to apply

Unfortunately, the right to vote was universally denied to women and slaves

their own standards to national elections. At the same time, they could not exercise a double standard in order to deny the vote to certain classes of people in national elections.

Of course, like most compromises, this one was less than desirable. For example, if a particular state wished to discriminate against a class of its citizens on the level of state elections, the discrimination carried over into national elections. And under the Constitution, there was nothing the federal government could do about it.

And so, despite the opportunity the states would have to prevent certain people from voting, the right to vote was left open-ended in the final version. The desire for ratification was the overriding consideration in reaching this compromise.

As it happened, voting qualifications among the states varied widely. In some states, only adult (at least 21 years old) white male property owners could vote. In others, adult white male taxpayers were also allowed to vote. In a few places, eligibility to vote depended also on whether or not a person belonged to an official, or recognized, church.

But advocates of the compromise on voting reasoned that the states themselves would amend their own constitutions regarding this right—as social conditions permitted.

To some extent, their expectations were fulfilled. Little more than 50 years after the U.S. Constitution was ratified, religious and property-ownership qualifications for voting had disappeared from all state constitutions throughout the young republic.

Unfortunately, the right to vote was universally denied to two categories of people: women and Negro slaves.

In the scheme of things, Negroes were the first of the two to be given the right to vote. But passage of the Fifteenth Amendment to the Constitution, which forbade voting discrimination on the basis of "race, color, or previous condition of servitude" came only after the Civil War, which nearly destroyed the Union.

A major cause of the Civil War was the issue of slavery. It was an issue that had been neatly side-stepped by the men who wrote the Constitution. But though their compromise may have made the Civil War inevitable, as some historians believe, it must be remembered that the Constitution as a whole represents numerous compromises among many different groups trying to work out the problems of unification of the states.

In effect, the Constitution tacitly acknowledges the existence of slavery without approving or condemning it. This acknowledgment came

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in the form of what is known as the "three-fifths compromise," which was reached during the Constitutional Convention in 1787.

The "three-fifths compromise" was an attempt to resolve differences between the northern and southern states. The South wanted Negro slaves counted as free men in the census. Counting them as such would have the effect of increasing the number of southern representatives in the House of Representatives, thus giving the southern states a greater voice in national affairs.

The North, on the other hand, wanted the slaves to be legally considered property. It was argued that in spite of the South's desires in the area of representation, Negro slaves had none of the rights of free men. Another rationale behind the North's position was that counting slaves as property would effectively increase the amount of taxes paid into the Treasury.

The compromise provided that slaves should each be counted as three-fifths of a person. This scheme partially satisfied the Southern desire for greater representation. And it also satisfied, in part, Northern wishes regarding taxation in the South.

But if the "three-fifths compromise" made possible the ratification of the Constitution, it did not eliminate the friction between North and South on the issue of slavery. While the causes of the Civil War were complex, slavery remained one of the major issues—in spite of the compromise.

Following the Emancipation Proclamation, which came during the Civil War, an important question was raised: "If Negroes are to be free, should they not also enjoy the rights of free men, including the right to vote?"

The mood in the South made it clear that a constitutional amendment was needed to guarantee Negroes this right. So Congress passed the Fifteenth Amendment to the Constitution, which was ratified in 1870, just 27 years after white male suffrage had more quietly become an accepted fact.

But the Fifteenth Amendment, by itself, could not immediately guarantee the franchise to Negroes. Certain states, intent on denying them their right to vote, imposed a poll tax on elections. Negroes, poor as they were after centuries of servitude, could not afford the tax and so could not vote.

In other states, exclusion from voting in primaries made meaningless the Negro's right to vote in a general election. Since these states were dominated by one political party, it was the primary election which determined the ultimate outcome of the race. Thus, even though Negroes were permitted to vote in the general

Certain states, intent on denying Negroes their vote, imposed a poll tax

It wasn't until 1944 that the Supreme Court rectified the situation

election, their vote was rendered worthless.

In still other states, literacy tests had to be taken before a person was allowed to vote. Negroes, denied formal education for centuries, could not, as a rule, pass such tests. In many cases, the tests were rigged so that even literate persons could not have passed them. As a result, Negroes were not allowed to register to vote.

The struggle to overcome these obviously discriminatory laws against black people was long and diffcult.

In the early 1920s, a black man named Nixon claimed in court that a Texas law forbidding Negroes to vote in primaries violated his rights. Nixon's case eventually went to the U.S. Supreme Court. In 1927, the Court ruled that the law indeed violated Nixon's rights under the Fourteenth Amendment, which provides equal protection of the law for all citizens.

But the Texas legislature sidestepped the Court's decision by passing a new law. This time—instead of the state deciding that Negroes could not vote in primary elections—the right to decide who could and could not vote was placed in the hands of each political party in the state. That party decided to exclude Negroes, just as the state had done earlier.

Nixon once again filed suit, and in 1932 the Supreme Court ruled again in his favor. Both rulings were based on the Fourteenth Amendment; both times, the Court held that state action was responsible for infringing on the rights of citizens.

But the opponents of the Negro's right to vote were not easily put off. Next, the political party's state convention passed a resolution strictly defining membership in the party. The resolution declared that only whites eligible to vote under the state constitution were eligible for party membership. This meant that only whites could vote in primaries to select candidates for general elections.

When another black man challenged the constitutionality of this move, the Supreme Court ruled against him. In 1935, the Court said that the party's resolution was private rather than state action. It could not, therefore, be affected by the provisions of the Fourteenth Amendment.

Read the Fourteenth Amendment. Why did the Supreme Court rule against the Negro right to vote in this instance when, in both cases filed by Nixon, it ruled in favor of it? Do you think the Court's ruling was right? Do you consider it just in light of the Fourteenth Amendment?

It wasn't until 1944 that the Court rectified the situation. Lonnie Smith, who fulfilled all requirements for voting in Texas primaries except the color of the skin, filed suit against a state official who refused to give him a primary ballot. This time the

Court ruled that the resolution of the Texas political party was state action under the terms of the Fifteenth Amendment. The all-white primary was history.

The struggle against the injustice of the poll tax took even longer. Ultimately, in January, 1964, the Twenty-Fourth Amendment to the Constitution was ratified. It forbade states to deny any citizen the right to vote for failure to pay a poll tax or any other tax.

But in spite of Supreme Court action against literacy tests and in spite of the Twenty-Fourth Amendment, abuses against the franchise for Negroes continued.

In 1965, Congress acted at last to eliminate these abuses. The Voting Rights Act of 1965 suspended literacy tests nationally and directed that Negro voters be registered by federal examiners whenever a state or county was found to have had literacy tests as of November 1, 1964 and could be shown to have had less than half of its eligible voters registered to vote.

In the final analysis, it took nearly a century from the passage of the Fifteenth Amendment, guaranteeing Negroes the right to vote, until that guaranteee became a reality.

One of the ironies surrounding the struggle for black suffrage is the role women played in the ratification of the Fifteenth Amendment. The women's suffrage movement, which dated all the way back to the 1840s, lent the Amendment its strong support. It did so in the hope that voting discrimination because of sex would also be eliminated by the Amendment.

At the last minute, Congress decided not to include women in the Amendment. Their exclusion was a bitter pill for the suffragettes to swallow, but it had the effect of giving new momentum to the movement.

One result of this increased momentum was that by the end of the century, four states—Colorado, Idaho, Utah, and Wyoming—had extended full voting rights to women. The action by the legislatures of these states gave great encouragement to the movement. By 1914, seven more states followed suit.

But piecemeal action by various state legislatures was not enough. The suffragettes feared that unless they were guaranteed the right to vote by the Constitution, they could never enjoy true equality with men.

Largely as a result of their strong contribution during World War I, sentiment for women's right to vote grew by leaps and bounds. Finally, in August, 1920, the Nineteenth Amendment to the Constitution was ratified by a very slim margin. The Amendment prohibited denying any citizen the right to vote because of sex.

One of the ironies surrounding the struggle for black suffrage is the role women played

Vietnam served to tip the scales in favor of granting 18-to-20-year-olds the vote

Even after the right to vote had been extended to Negroes and women, one other group still sought the franchise—the 18-to-20-year-olds.

For many years, people had argued that if a person were old enough to be required to serve in the armed forces, it followed that he or she was old enough to vote. "Old enough to fight, old enough to vote!" was a familiar cry of those favoring the franchise for persons between 18 and 20 years of age.

The strongest argument in favor of granting the vote to this age group was that, because of the draft, its members were required by law to take part in wars over which they had no political control. The right to vote, the argument went, would give young people power to state their views effectively to the politicians who had the power to send them off to foreign lands to fight.

Perhaps the strongest opposing argument was that the ability to fight in a war had little to do with the ability to vote intelligently. Just because a young person knew how to fire a gun didn't mean that he knew how to deal with the complexities of politics.

As much as anything, the war in Vietnam served to tip the scales in favor of granting 18-to-20-year-olds the vote. The war showed that young people had achieved a high degree of political awareness. And the course of the war demonstrated that they surely deserved to have a say in whether or not they should be required to go to war—especially an undeclared war.

By March, 1971, Congress had been persuaded that 18-to-20-year-olds should have the right to vote. It took only three months more for a majority of the states to agree and to ratify the Twenty-Sixth Amendment to the Constitution.

The struggle for securing the franchise had consumed nearly two centuries since the signing of the Declaration of Independence.

Perhaps the greatest problem surrounding the right to vote today is that so few Americans do so—despite the fact that they are registered and that their role as voters is crucial to the continued existence of justice for themselves and their fellow citizens.

In a very true sense, to vote is to participate in the quest for justice that is the American heritage.

Given the long struggle to achieve universal suffrage in the United States, why do you think so few people go to the polls at election time? In your experience, do people you know understand the difficulties previous generations underwent in obtaining and keeping the right to vote? What other avenues are available to citizens seeking justice and meaningful participation in American society?

"I'm arm'd with more than complete steel, the justice of my quarrel."
Christopher Malowe, *Lust's Dominion*

Justice and First Amendment Freedoms

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

—First Amendment to the U.S. Constitution

Of all the debates that raged during the writing of the U.S. Constitution, none seems stranger today than the one dealing with the rights of the individual.

On one side were those who displayed an almost total distrust of government. They were convinced that the Constitution must spell out all the rights government would guarantee to citizens. They pointed to the British Bill of Rights, passed in 1689, as a precedent for their argument in favor of an American Bill of Rights.

On the other side, Alexander Hamilton argued that the bill of rights proposed by some was not only unnecessary, but dangerous. What was the point, he asked, of forbidding things which government, under the new Constitution, had no power to do in the first place? To tack a separate bill onto the Constitution as it had been drafted, he said, would be to imply that government possessed powers it clearly was not intended to have.

Still others pointed to the elaborate bills of rights contained in half a dozen of the states' constitutions. They claimed that each state had the right to decide on the rights of its citizens and that a federal bill of rights would violate that right.

As it turned out, the U.S. Constitution was adopted

Few rights have been as crucial to freedom and justice as the First Amendment

without a bill of rights. But popular sentiment was strongly in favor of adding one to the original document as soon as possible.

As a result—just six months after the new Constitution went into effect—Congress passed the Bill of Rights. The Bill consisted of the first 10 Amendments to the Constitution. Little more than two years later, three-fourths of the states had ratified those Amendments.

What do you think of the arguments for and against a Bill of Rights? Can you recall any recent issues involving one or more of the first 10 Amendments to the Constitution?

Generally speaking, the first 10 Amendments to the Constitution covered the basic rights of the individual. Other amendments ultimately proved necessary to solidify and amplify the rights covered by the first 10 Amendments. Especially important were the 13th, 14th, and 15th Amendments. They prohibited slavery, guaranteed equal protection and due process of the law to all citizens, and prohibited voter discrimination on the basis of race.

All the rights covered by these amendments have been important in the course of our history. But few have been as crucial to freedom and justice as the First Amendment guarantees of freedom of speech and of the press.

The first test of freedom of expression in the new nation of the United States was not long in coming. In 1798, Congress passed the Sedition Act, which imposed heavy fines and punishment on anybody writing, publishing or speaking "with intent to defame" Congress or the President. Under the terms of this act, it made no difference whether what somebody said was true or false. In effect, the law was an attempt to limit freedom of expression in the United States.

How could Congress pass a law that so clearly violated both the letter and intent of the First Amendment? There were two reasons.

First, the precedent for free expression, as the legislators of the time understood it, was in British common law. That precedent held that free expression was not to be tolerated where it endangered the government or enforcement of its laws. This, at least, appears to have been the rationale of those legislators who supported the Sedition Act.

Second, those legislators were members of the Federalist party, and they controlled the Congress. The Federalists were determined to weaken Thomas Jefferson's new Republican party, which they saw as a threat to their own party. Thus some of their motivation was purely political—a far cry from the idealism that led to the passage of the First Amendment.

Americans were outraged by the Sedition Act. One result of their outrage was that Jefferson won the presidency. Another was the writing of resolutions condemning the Act by the predominantly Republican legislatures of Virginia and Kentucky. Both resolutions were widely circulated among other state legislatures, thus increasing discontent among the states over the Sedition Act.

Ultimately, the federal government paid back those who had been convicted and fined under the Sedition Act. It died a less than quiet death, having discredited the Federalists in its passing.

The controversy over the Sedition Act thus emphasized the importance of the constitutional guarantee of free expression in the young nation.

More than a century later, an act of the same name rekindled the controversy. The Sedition Act of 1918, which amended the Espionage Act passed the previous year, stirred an uproar in certain quarters of the nation. But the uproar was nothing compared to the one in 1798. The reason? The United States was at war.

The new Sedition Act was intended to squelch criticism of the war effort. It provided for a fine of $10,000 and up to 20 years in prison for anyone convicted of obstructing the sale of war bonds, inciting insubordination among American troops, or discouraging recruiting efforts for the armed forces.

The Act also punished anybody who would "wilfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language" that interfered with the war effort.

The provisions of the Sedition Act were challenged almost immediately as hundreds of people were arrested and charged with violating it. One of those convicted under the new law was the general secretary of the Socialist Party, a man named Charles Schenck.

Schenck had printed 15,000 copies of a leaflet criticizing the draft and the war. He had distributed them to men already drafted as well as to those about to be drafted.

Schenck did not deny that he was guilty of the charges against him. But he nevertheless appealed his conviction to the Supreme Court. He argued that the law had violated his rights under the First Amendment and was thus unconstitutional. He insisted that he had the constitutional right to print and distribute the leaflets.

The Court disagreed with Schenck and upheld his conviction. In doing so, Justice Oliver Wendell Holmes clarified the limits of free expression.

Justice Holmes admitted that, in ordinary times, Schenck would likely have

The Sedition Act of 1918 stirred an uproar . . . The United States was at war

The Court's decision demonstrated that freedom of speech is not an absolute right

been well within his constitutional rights in printing and distributing the leaflet. "But," he declared, "the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

Justice Holmes also said that it was necessary in every case to decide whether the words used "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The Court's decision demonstrated that freedom of speech in the United States is not an absolute right. Rather, it can, under certain circumstances, give way to other vital considerations—such as national security and the general welfare of society. And while this principle still stands today, recent cases have shown that the reasoning behind decisions regarding freedom of expression has become increasingly complex and sophisticated.

The war in Vietnam provided the courts with a number of opportunities to re-examine Justice Holmes' guidelines.

In early 1966, David O'Brien and three of his friends burned their draft cards on the steps of a Boston courthouse. Arrested by FBI agents on the scene, O'Brien stated that he had burned his card to express his beliefs, which included a strong antiwar stance.

O'Brien was convicted for his action in a federal court in Massachusetts. The court found him guilty of violating a provision of the Universal Military Training and Service Act of 1948 which made it a crime to knowingly destroy or mutilate a draft card. When a Circuit Court of Appeals reversed his conviction, the government asked the Supreme Court to review the case.

The Court agreed to hear the appeal and weighed O'Brien's claim that the law violated his First Amendment guarantee of freedom of speech. Chief Justice Earl Warren, speaking for the majority, disputed the claim, noting that the intent of the law in question was designed to protect the "substantial government interest" of "the smooth and proper functioning of the system that Congress has established to raise armies."

In short, O'Brien's burning of his draft card was ruled to have been a violation of law that had a very specific purpose despite the fact that he had intended his action to be what is known as symbolic speech.

Not long after the Court had ruled against David O'Brien, another freedom of expression case relating to Vietnam came before it. This case involved the

"It can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate"

wearing of black armbands by three students in a Des Moines, Iowa school district.

The students—John and Mary Beth Tinker, Chris Eckhardt—defied a ban on the armbands issued by school officials. All three wore the armbands to school to protest United States involvement in the war.

As a result of their act, all were suspended from school until they would agree not to wear the armbands. Attorneys for the students sought a federal court injunction preventing school officials from disciplining them. But the court ruled the suspensions constitutional, holding that they were reasonable action taken to prevent a disturbance at the school. The U.S. Supreme Court, however, thought otherwise, ruling that the wearing of the armbands was "entitled to comprehensive protection under the First Amendment."

The Court disputed the contention of school officials that the wearing of the armbands would disrupt the workings of the school or that it would likely create a disturbance. Said Mr. Justice Fortas, who delivered the Court's opinion: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

The *O'Brien* and *Tinker* decisions are but two examples of the delicate and difficult judicial responsibility of protecting the individual's right to express opinions freely and openly while at the same time insuring that vital societal concerns are carried out in an orderly and effective manner. While this is by no means an easy task, it plays an essential role in America's search for justice.

Secure copies of the *O'Brien* and *Tinker* decisions. What are the similarities and differences between the cases? What is the reasoning behind the decision in each case? Under what circumstances, if any, should freedom of speech give way to other considerations? Under what circumstances if any, is freedom of speech an absolute right?

In general, freedom of speech may or may not be connected with freedom of the press, depending on whether publication is involved. But freedom of the press nearly always involves free speech, serving as a practical tool for the dissemination of information and opinions. It can also be said that the development of a free press in the United States has been a fairly even and consistent process.

In truth the Founding Fathers had good reason to be concerned about a free press. As early in our history as 1662, restrictive censorship of the press had been enforced in Massachusetts by the British governor. And at different times in the early colonial period, similar censorship had been experi-

enced in New York, Pennsylvania, and elsewhere.

By the early 1700s, much of this censorship had gone by the boards. The royal governors tolerated, with varying degrees of uneasiness, an ever-increasing number of weekly and daily newspapers over which they exercised little, if any, real control.

Their uneasiness was well-founded, as the case of John Peter Zenger in the 1730s demonstrated. Zenger, who published the *New York Weekly Journal*, printed a number of articles criticizing William Cosby, the British governor. Under British law, any attack upon an official of the Crown was considered to be seditious libel. Cosby had Zenger arrested and brought to trial on the charge in 1735.

In Zenger's defense, his attorney, Andrew Hamilton, argued that what he had printed about the governor was true—and he offered to prove that it was—but the judge told the jury that its only concern was to decide whether or not Zenger had actually printed the articles.

Hamilton then addressed the jury, appealing to their pride, patriotism, and desire for freedom. He disputed the judge, saying that if a statement were true, then it could not be libelous. The jury agreed with Hamilton and brought in a unanimous verdict of "not guilty."

The Zenger verdict convinced many colonists that there was a genuine need for a constitutional guarantee against interference with the press. Written into the Constitution by the First Amendment, this guarantee bore immediate fruit. Daily and weekly newspapers sprang up throughout the states. In many small towns, in fact, there were often two or more papers competing with one another.

Attempts to suppress freedom of the press throughout our history have been sporadic and ineffective. One such attempt occurred in the early 1930s, when the state of Louisiana attempted to impose a two percent gross receipts tax on newspapers with a circulation of 20,000 copies or more per week.

As it turned out, there were only 13 newspapers in this category, and only one of them was not opposed to Louisiana Senator Huey P. Long, who was responsible for the tax. When the case went before the U.S. Supreme Court, the tax was ruled to be in violation of the due process clause of the 14th Amendment. The Court said that the tax's only purpose was to prevent the circulation of information to the people.

During World War II, the government created a U.S. Office of Censorship, which operated from December, 1941 to August, 1945. The purpose of this department was to control the flow of vital military information that would endanger the war effort if it became known to

Attempts to suppress freedom of the press throughout our history have been sporadic

New York Times officials felt that the Pentagon Papers were too important to keep from the public

the enemy.

But even during this period, the government sought the voluntary cooperation of the American press and usually received it. Only once during the war was vital information leaked through a story in a newspaper. In a story on the war, the reporter inadvertently told how the United States had broken top-echelon Japanese codes. But the story was a blunder, the newspaper apologized, and no action was taken against the reporter.

The conflict in Vietnam, however, generated many important and complex issues relating to freedom of the press. The most important of these concerned the publication of the *Pentagon Papers*.

In early 1971, Daniel Ellsberg, an analyst with a top-secret Defense Department clearance, turned a large number of documents, now known as the *Pentagon Papers*, over to the *New York Times*. With utmost secrecy and security, the *Times* examined the documents for three months before deciding to publish them. It was clear that Ellsberg had stolen the documents, but the story they told, in the view of *Times* officials, was too important to keep from the public. It was the true and tragic story of the nation's involvement in the war in Vietnam.

The *Times* published the first three installments of the *Pentagon Paper* on June 13-15, 1971. The Department of Justice, claiming that the national security was in jeopardy because of the publication, brought suit to prevent further publication. For two weeks, Americans watched as arguments raged over preservation of freedom of the press and the need for national security.

The *Times* and the *Washington Post*, which had also published part of the *Pentagon Papers*, appealed to the Supreme Court. They claimed that suppression of the papers was a direct violation of freedom of the press, as it is guaranteed under the First Amendment.

Having heard the arguments, the Court ruled that the government had not met its burden of showing justification of the study. "Any prior restraint on expression comes to the Court with a heavy presumption against its constitutional validity," said Justice William O. Douglas in one of the seven opinions handed down in the case.

And Justice Hugo Black, in a concurring opinion, said, "In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment." The vote was by no means unanimous. By a 6-to-3 margin, the Court upheld the free-

dom to publish the documents.

How would you have decided this case? By upholding the newspapers' right to publish, was the court saying that our nation's national security would not be affected by making the documents public? Explain. Might this case have been decided differently if it had arisen several years earlier? Several years later?

Since the *Pentagon Papers* decision, a variety of freedom of press issues have held our attention. In the sordid saga of Watergate, the press took an active and major role. While most Americans welcomed an open and thorough investigation of Watergate, many questioned what they considered to be libelous, unfounded, and vituperative attacks by the press regarding Watergate figures and events. They accused the press of sensationalism designed to sell newspapers rather than to get at the truth. Often, stories were based on information secured from an unnamed confidential source or from a high-ranking official. When newsmen were subpoenaed to reveal the source of their information, many refused to do so arguing that disclosure would dry up such sources—that it was the existence of confidentiality which enabled them to secure vital news stories and thus provide the public with important information. Opponents of such confidentiality argued that there must be some accountability for reporting which may cause irreparable harm to the functioning of government and the reputation of individuals. As this booklet is written, the debate continues.

In the sordid saga of Watergate, the press took an active and major role

How would you resolve this issue? Is there a means of protecting confidential sources of information while insuring fair and accurate reporting? Invite proponents for each side of the issue to discuss their views.

These are but some of the issues which have arisen under freedom of the press. Freedom of the press has also come into sharp conflict with other freedoms guaranteed by the Constitution. One such freedom is the right to a fair trial, and the way freedom of the press can affect that right is discussed in the next section of this booklet.

"The hope of all who suffer, the dread of all who wrong."

Mantle of St. John DeMatha John Greenleaf Whittier

Justice for the Accused

In the view of the Founding Fathers, few rights were more important than the rights of persons accused of breaking the law. The Constitution itself contains many guarantees of the rights of the accused. And fully half of the Amendments in the Bill of Rights are aimed at providing justice for accused persons.

The constitutional guarantees of justice for the accused include:

(1) the right to a writ of habeas corpus, which guarantees an imprisoned person the right to appear before a judge to determine whether he is being held illegally—Article I, Section 9.

(2) the right to a trial by jury—Article III, Section 2.

(3) a prohibition against bills of attainder, which are legislative acts that strip a person of his civil rights without benefit of a trial—Article I, Sections 9 & 10; Article III, Section 3.

(4) a prohibition against passage of ex post facto laws, or laws designed to apply to offenses committed before their passage—Article I, Sections 9 and 10.

(5) safeguards for persons accused of treason, requiring that such persons be convicted only on their own confession in open court or on the testimony of at least two witnesses—Article III, Section 3.

Although it was argued that no other safeguards were needed to guarantee justice for the accused, the men who wrote the Bill of Rights had other ideas. They devoted the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution to protecting further the rights of the accused.

The Fourth, Fifth, Sixth and Eighth Amendments provide that no citizen shall be subjected to unreasonable searches . . .

Those four Amendments, among other things, provide that no citizen shall be subjected to unreasonable searches and seizures by the government. This prohibition is the firm foundation upon which our cherished right to privacy is established.

The Amendments also require that accused persons must be indicted before being tried, and that a person cannot be tried twice for the same offense, or be forced to be a witness against himself.

Once a person is indicted, he must be informed of the nature and cause of the charge against him. He is entitled to a speedy and public trial by jury and has the right to confront witnesses against him, to have witnesses on his behalf appear in court, and to be represented by counsel.

The government is forbidden to impose excessive bail or fines on an accused or convicted person. Those convicted of crimes cannot be subjected to what the Eighth Amendment calls cruel and unusual punishments.

Why this zeal for ensuring justice for the accused? Basically, the American system of justice is based on the concept that an accused person is innocent until proven guilty. In other words, the burden of proof in any criminal proceeding is on the government. Under this system, the government must produce evidence to prove that the accused has committed the act for which he is being tried.

In a very real sense, the guarantees embodied in the Fourth, Fifth, Sixth and Eighth Amendments ensure that this concept will be honored. With the guarantees as guidelines, the government must prove its case against an accused person beyond a reasonable doubt. Otherwise, his innocence is presumed and he must be set free.

This emphasis on guaranteeing the rights of the accused results from the colonists' experience of justice as it had been administered by the British up to the time of the American Revolution.

British law had traditionally imposed brutal punishments on people for what often amounted to trifling offenses. At one time, for example, there were some 200 offenses in England punishable by death. Among them was the simple act of stealing. Another reason for the colonists' concern with the rights of the accused was the British habit of suspending the writ of habeas corpus in the colonies whenever it suited their purposes. A third reason among many was that bills of attainder had long been a common practice in England. Henry VIII, for example, used them to get rid of ministers he believed he could no longer trust.

In short, the Founding Fathers viewed British jus-

tice as repressive and unfair. Many colonists had left England because of what they regarded as the essential injustice of the British legal system. They were determined to create a system of justice that would apply equally and fairly to all citizens.

The men who wrote the Bill of Rights were also filled with an enormous respect for and love of liberty. They regarded the loss of liberty as the worst thing that could happen to a man or a woman. They believed that anyone faced with that loss deserved every chance to defend himself fairly and adequately against this possibility.

As with many other tests of rights guaranteed under the Constitution, one of the first major tests of the rights of accused persons came during wartime.

In 1861, shortly after the outbreak of the Civil War, a civilian named John Merryman was arrested in Maryland. Merryman was known to have made a number of statements against the cause of the Union. He was taken by military authorities and incarcerated in Fort McHenry.

With a charge of treason pending against him, Merryman petitioned Chief Justice Taney of the U.S. Supreme Court for a writ of habeas corpus. Taney, then on temporary duty as a circuit court judge, issued the writ. But military authorities refused to deliver Merryman to court. They justified their refusal by saying that they had been authorized to do so by President Lincoln.

Justice Taney ruled that the President lacked the authority to suspend the writ of habeas corpus. This power, said the Justice, could only be exercised by Congress, acting under its authority as defined in the U.S. Constitution.

Justice Taney also ruled that the military cannot arrest a person who is not subject to the rules of war. This could be permitted only when the person had committed an offense against the United States, and military personnel could only do so when they were acting to assist civil authorities.

As a result of this ruling, John Merryman was set free. No other President has ever attempted to suspend the writ of habeas corpus. In Lincoln's case, he asked Congress to pass a law suspending the right, and it complied. The suspension lasted to the end of the war in 1865.

During the decades following the Civil War, a number of cases arose involving the constitutional rights of accused persons. For example in one case the Court ruled that a West Virginia law requiring all-white juries violated the rights of black defendants. And in another case, the Court overturned a young man's conviction for rape on the

The colonists were determined to create a system of justice that would apply equally to all

In 1925, the Fourth Amendment, prohibiting unreasonable searches and seizures, was put to the test

ground that the trial judge had not made effective provision for him to be represented by counsel. Despite these and other cases, however, the constitutional rights of accused persons were not the major civil and social concern during this period that they have become in recent times. It was not until the 1920s, however, that the rights of the accused began to come into their own in the courts of the land.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

—Fourth Amendment to the Constitution

As with many other guarantees in the Bill of Rights, the prohibition against unreasonable searches and seizures has its origins in the British administration of the colonies.

A major reason for the Fourth Amendment lies in what are known as the Writs of Assistance. These Writs, which enabled British authorities to search the homes and property of the colonists without first fulfilling conditions such as those laid down in the Amendment, were intolerable to the colonists. Among many other reasons they provided a strong impetus for a Bill of Rights.

For the most part, there were no serious challenges to this constitutional guarantee during the century following ratification of the Constitution. But in 1925, the Amendment was put to the test.

A man named Agnello had been arrested and convicted in the early 1920s of conspiring to violate the Harrison Act, which prohibits the sale of narcotics. Evidence used against him had been obtained by police through what Agnello claimed was an illegal search of his home. He appealed his conviction to the U.S. Supreme Court in 1925.

The Court ruled that since police had searched Agnello's home without a warrant, they had violated his constitutional rights guaranteed by the Fourth Amendment. Agnello's conviction was overturned.

Only three years later, cases such as Agnello's would be joined by cases complicated by the onset of the technology of the modern world. The technology in one case was the telephone.

A man named Olmstead and three associates were arrested and convicted of conspiring to violate the National Prohibition Act by unlawfully importing, possessing and selling intoxicating liquors. Evidence against the four had been obtained by wiretaps outside their residences—wiretaps that

had been placed in the basement of the building housing Olmstead's offices. Olmstead appealed his conviction to the U.S. Supreme Court, charging that the wiretaps and their subsequent use in court violated his rights under the Fourth and Fifth Amendments.

The Court, however, saw that situation differently. Since the wiretaps had been placed outside the home and offices of the accused, the Justices said, there had been no illegal search. And since only the voices of the accused had been obtained by the taps, there had been no seizure. The Court made clear that its ruling was designed to give the forces of law and order an even chance against criminal elements in the country. Olmstead's conviction was upheld.

But the Court's verdict in the *Olmstead* case had been delivered by a narrow margin of 5-to-4, with a dissenting opinion, delivered by Justice Louis D. Brandeis, which provided a prophetic statement of the issue. Justice Brandeis said, "The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurences of the home. . . .The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. . . .writs of assistance . . . . are but puny instruments of tyranny and oppression when compared with wiretapping."

Justice Brandeis' dissent in the *Olmstead* case was echoed 40 years later in a celebrated case in the state of California.

A man named Charles Katz was convicted in the mid-1960s of illegally using the telephone to transmit betting information. Evidence against Katz was obtained by agents who attached an electronic listening and recording device to the outside of the phone booth Katz used to make his calls. Katz's appeal to the California Court of Appeals had been rejected since there had been "no physical entrance into the area occupied."

The Supreme Court, by a vote of 7-to-1, reversed his conviction on the ground that the means of obtaining evidence against him violated his Fourth Amendment protection against unreasonable searches and seizures. The ruling differed from the *Olmstead* case in that the 1967 Court interpreted the Fourth Amendment as being intended to protect people, not places. The 1925 Court had interpreted it as protecting only the places in which people

"Espionage is not likely to stop with wiretapping"

Technology has brought freedom of the press into direct conflict with the rights of the accused

might happen to be.

Should evidence which is unlawfully secured be inadmissible in a court of law? Why or why not? What if the exclusion allows an accused to go free? Should police who secure evidence unlawfully be subject to criminal sanctions? What remedies are available to individuals who feel their Fourth Amendment rights have been violated?

But search and seizure cases were not the only area in which improved technology would affect the rights of accused persons in the 20th century. Beginning with the development and widespread use of high-speed presses in the early decades of this century, the reach of the media in the United States exploded. The coming of the wire services, including the ability to transmit photographs and the added ability to print them inexpensively in newspapers, gave the American press a power the Founding Fathers could not have anticipated.

Nor could they have anticipated radio news broadcasting as it developed. Least of all could they have foreseen the development of television news broadcasting, with its minicams and their capability of reporting news from the scene.

Taken together, these technological advances have made it possible for the media to report the news almost instantaneously. At the same time, they have given the media the ability to exercise an immediate effect on people's views of issues large and small.

There have been many cases in this century in which this ability has brought freedom of the press into direct conflict with the rights of accused persons. The most famous of these is the Sam Sheppard murder trial.

In early July, 1954, a Cleveland surgeon named Sam Sheppard telephoned friends for help. When they arrived at his home, they found him in a dazed and battered state. Upstairs, they found the body of his wife, Marilyn, her skull crushed almost beyond recognition.

At first, the doctor was not a prime suspect in the murder. He told of having battled with an intruder, who had knocked him unconscious before murdering his wife. But soon the newspapers began to investigate the possibility that Dr. Sheppard was guilty and had fabricated his battered appearance. Soon, the doctor was a prime suspect in the murder investigation.

Before long, the newspapers began to try Dr. Sheppard in their pages. They were impatient that the police had made no arrest. The Cleveland press ran a headline that read, "Somebody is getting away with murder." The story that followed suggested that that somebody was the doctor. Other stories and sensational headlines followed. "Why

Isn't Sam Sheppard in Jail?" and "Quit Stalling—Bring Him In" were but two of many that filled the pages of local papers in the weeks following the discovery of Mrs. Sheppard's body.

Largely as a result of newspaper publicity on the case and the doubts of the media regarding his story, Dr. Sheppard was brought to trial for the murder. By the time the trial began, virtually every major newspaper in the United States was giving front-page coverage to the case.

To make matters worse, radio and television reporting of the case combined with the newspaper coverage to give the entire affair the aspect of a carnival. The judge, jurors, attorneys and others involved in the case were repeatedly interviewed during the trial and became instant celebrities. Thousands of people showed up at the trial as a result of the publicity. Dr. Sheppard was ultimately convicted of murder in the second degree and sentenced to life imprisonment.

Two years after his conviction, he appealed to the U.S. Supreme Court to review his conviction. He claimed that unfavorable pretrial publicity had denied him his right to a fair trial. The Court declined to hear the case.

Ten years later, a U.S. District Judge in Dayton, Ohio agreed that he had not received a fair trial for the reasons claimed. He ordered Dr. Sheppard released immediately. But within months of this decision, the 6th U.S. Court of Appeals reversed the lower court's decision and ordered the doctor back to prison.

Less than a year later, the U.S. Supreme Court finally heard the *Sheppard* case. This time the Justices agreed with the District Judge and reversed Dr. Sheppard's conviction.

The Court, speaking through Justice Clark, said "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."

They ordered a new trial for Dr. Sheppard consistent with the guidelines provided in their decision. At the second trial, Dr. Sheppard was found to be not guilty.

None of the various appeals involved in the *Sheppard* case, however, had dealt with the question of his guilt or innocence of the charge brought against him. The important question was whether he had been denied his right to a fair trial.

The lesson of the *Sheppard* case was lost neither on the courts nor on the press itself. In the years since his

"Due process requires that the accused receive a trial by an impartial jury free from outside influences"

The Supreme Court rulings in the Escobedo and Miranda cases were landmark decisions

release, television cameras and other broadcasting equipment have been banned from virtually all the courtrooms in the United States. Taking of photographs, even without use of a flash attachment, is similarly prohibited. Recording equipment, too, may not be used. (Reporters, however, are allowed to sit through trials and take notes on the proceedings.) All of these measures are designed to preserve the dignity of the courtroom and to assure the accused of a fair trial.

Other constitutional guarantees of accused persons have been interpreted in their favor by the courts—and especially by the U.S. Supreme Court. One famous case involved a young Chicago man named Danny Escobedo. In the early 1960s, Escobedo was convicted of murdering his brother-in-law. Evidence leading to his conviction was obtained by the police during an interrogation in which they refused to allow Escobedo to speak with his attorney. The police also failed to warn the defendant of his constitutional right to remain silent.

Escobedo appealed to the U.S. Supreme Court, claiming that his right to counsel under the Sixth Amendment had been violated by police. By a 5-to-4 vote, the Justices reversed his conviction. They ruled that the young man had, indeed, been denied his right to counsel—even though the denial had been in effect only during his interrogation by police and not during his trial for murder.

The Court's ruling in the *Escobedo* case is generally considered to be a landmark decision. It overruled previous court decisions which held that a confession was admissible as evidence even if it was obtained after a suspect's request for assistance of counsel had been denied.

The *Escobedo* decision set the stage for another major decision of the 1960s regarding the rights of the accused. This decision came in the case of *Miranda v. Arizona*.

Ernesto Miranda was arrested at his home on a charge of kidnapping and rape. He was then taken to a police station and questioned regarding the charges against him. Within two hours, he had signed a confession.

Like Escobedo, Miranda had not been advised of his right to remain silent. Nor was he told by police that he had the right to consult with his attorney before questioning. As a result of his written confession, he was convicted on both charges brought against him.

In appealing his conviction to the U.S. Supreme Court, Miranda argued that his confession had been improperly obtained and that it should not have been admitted as evidence in his trial. Like Escobedo, he claimed that his right to counsel under the Sixth Amendment

had been denied him.

This time, the Court went further than ever before in defining an individual's rights upon arrest. Chief Justice Earl Warren, speaking for the 5-to-4 majority, outlined the requirements that would from then on be demanded of law enforcement officers.

The Court ruled that prior to any questioning, a person must be warned that he has the right to remain silent, that any statement he makes can be used against him, and that he has the right to have an attorney present during interrogation.

The Chief Justice also said that if a defendant indicates his desire to see his attorney, there can be no interrogation. Even without an attorney, he cannot be interrogated without his consent.

What effect do you think the Escobedo and Miranda decisions have had on law enforcement in our country? Some people believe the Court went too far, virtually tying the hands of law enforcement officers. Do you agree?

Perhaps the most significant breakthrough during the 1960s in guaranteeing the rights of the accused came in the case of a man named Clarence Gideon. Gideon was convicted in a Florida court of the felony of breaking and entering with the intent to commit a misdemeanor.

When he first appeared in court for trial, he had no money and asked the court to appoint an attorney to defend him. The trial judge had refused, telling Gideon that such free counsel was available only to those on trial for capital offenses. (That is, offenses for which which the death penalty may be inflicted.)

Following his conviction, Gideon, without the assistance of counsel, appealed to the Supreme Court of the State of Florida, claiming that he had been denied his constitutional right to counsel. But this appeal was denied, and he prepared and submitted a written petition to the U.S. Supreme Court for relief.

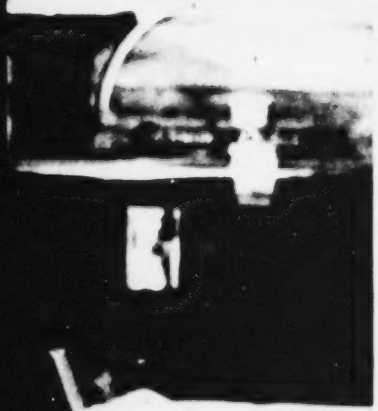
The Court agreed to hear Gideon's case. But his chances of a favorable decision seemed slim. More than 20 years earlier, the Court had ruled that a state court was not required to furnish counsel in cases not involving a capital offense.

To Gideon's relief, the Court voted unanimously to reverse his conviction. The Justices ruled that, in both capital and non-capital cases, an accused person could not receive a fair trial unless he was represented by a lawyer. And if he could not afford to hire a lawyer, the court was obliged to provide one for him.

Justice Hugo Black, in delivering the majority opinion in *Gideon v. Wainwright*, explained the Court's ruling:

"Reason and reflection require us to recognize that in the adversary system of criminal

Prior to questioning, a person must be warned of his rights



justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."

Gideon was granted a new trial and acquitted of the charge against him. The ruling in his case is considered a landmark decision in constitutional law. It extended the right to counsel guarantee of the Sixth Amendment to all citizens, regardless of their economic status.

The true significance of the *Gideon* decision is that it underscores the importance of counsel in a court of law. In doing so, it raises the whole problem of the need for delivery of legal services in civil, as well as criminal, proceedings. Far too many people fail to understand that a lawyer is essential in securing the protections they enjoy as citizens in a court of law. And far too many others cannot afford to retain lawyers—even assuming they recognize the value of competent counsel.

Should those who are indigent and convicted of crimes also be provided with free counsel to appeal the conviction? What about the right to counsel in civil cases? Can a poor person securé free legal assistance in a civil case? Explain. What about middle-income citizens? How can they locate competent counsel whom they can afford?

The right-to-counsel guarantee of the Sixth Amendment was extended to all citizens

"Justice is the constant and perpetual wish to render to everyone his due."

Justinian—Institutiones

Justice and Equal Protection of the Laws

During the century that has passed since its ratification, the Fourteenth Amendment to the Constitution has stood like a beacon on the shores of our constitutional system. Through the years, judges on all levels of our court system have turned to the Amendment's equal protection clause, seeing through its light vital guarantees of the rights of American citizens.

Similarly, those citizens—especially members of minority groups—have seen in the Amendment's guarantee of equal protection of the laws hope for the fulfillment of the promise that is America. Negroes, women, American Indians, Chicanos, Americans of oriental descent—all these and many more have pursued their search for justice through the equal protection clause of the Fourteenth Amendment.

In the forefront of attempts to secure equal protection of the laws has been the Negro. His quest has been the more difficult because the legal injustice against him was built into the Constitution itself. Article I, Section 3 specifies that the Negro is not to be considered a person for purposes of representation and taxation, but as "three-fifths" of a person.

The *Dred Scott* case was a landmark decision involving the Negro's search for equal protection. In 1834, a U.S. Army surgeon named Emerson left Missouri for Rock Island, Illinois. With him he took his Negro slave, Dred Scott, and Scott's family. Two years later, Dr. Emerson moved once again, this time to Fort Snelling in the Louisiana territory. And once again, he transported his slaves with him. In both instances, the doctor had moved them to places where slavery was forbidden by state laws.

The Dred Scott decision made it clear that Negroes were not legally entitled to equal protection

In 1838, Dr. Emerson returned to Missouri, where slavery was permitted. The Scotts moved with him and remained his slaves until the doctor's death some years later. At that time, Dred Scott was sold to a New Yorker named John Sandford.

With the help of an anti-slavery group, Scott filed suit against Sandford in 1847 in a Missouri Circuit Court. He claimed that the years he had lived in non-slave states had made him a free man. After a long battle in the courts, Scott's case came before the U.S. Supreme Court in 1857.

Basically, Scott claimed that his residence in free areas of the country had changed his status from slave to that of free man. As such, he argued, he was entitled to the rights and privileges guaranteed by the U.S. Constitution. One such privilege was that he could not be sold as a slave.

Unfortunately for Scott, the Supreme Court ruled against him by a vote of 7-to-2. The Court held that Negroes were not meant to be included under the term "citizen" in the Constitution. Therefore, Scott was not entitled to the rights and privileges guaranteed to U.S. citizens. The Court declared that since he was not a citizen, the courts had no jurisdiction in his case. He was not even entitled to file suit in a court of law.

The *Dred Scott* decision was important in many ways. Among other things, it contributed to the outbreak of the Civil War. It did so by weakening the effectiveness of the Missouri Compromise which had limited slavery to certain states. Its ultimate importance, however, was that it made clear that Negroes were not legally entitled to the equal protection of the laws of the United States.

After the Civil War had come to its bloody conclusion, the majority in Congress decided to right the wrongs exemplified in the *Dred Scott* case. The Civil Rights Act of 1866, among other things, included Negroes under the term "citizen" and guaranteed civil rights within the states.

But congressional backers of the law were worried. They feared—based on examples such as the *Dred Scott* decision—that some of its provisions might be declared unconstitutional. And they realized that there was still much opposition to the law throughout the nation. After all, they had had to override a presidential veto to pass the Civil Rights Act into law.

To avoid the constitutional question, Congress decided to take the major provisions of the Civil Rights Act and incorporate them into a constitutional amendment.

"No State shall . . . deny to any

person within its jurisdiction the equal protection of the laws."

FOURTEENTH AMENDMENT TO THE CONSTITUTION

The primary purpose of the Fourteenth Amendment was to provide a firm constitutional basis for Negro civil rights. It complemented the Thirteenth Amendment, which forbade slavery, by guaranteeing that Negroes would be protected by the Constitution and Bill of Rights. Especially important was that the Amendment forbade the *states* to make laws interfering with the rights of Negroes or those of any other group.

Congress believed it had brought about a revolution in the U.S. constitutional system by giving itself broad power to prevent abuses of civil rights. But, as it turned out, enactment of the Amendment and adherence to its provisions by the states were very different matters.

For one thing, the mood of Congress was largely determined by the mood prevailing in the country during Reconstruction. When federal troops were pulled out of the South in 1877, signaling an end to Reconstruction, the mood changed. Soon, the Northerners who had gone South to work in state governments returned North. The white Southern legislatures began almost immediately to ignore the letter and intent of the Fourteenth Amendment. In short, national sentiment for Negro civil rights waned just a decade after the end of the Civil War. Everybody wanted to forget the war and its causes.

More important, perhaps, was that the Reconstructionists in Congress had miscalculated what the courts would do under the terms of the new Amendment. They had believed that the courts would apply the Amendment to civil rights cases in such a way as to provide justice for Negroes. But the courts—especially the U.S. Supreme Court—continued to interpret Negro civil rights in a traditional fashion.

Such was the case even though the Fourteenth Amendment defined citizenship for the first time in U.S. history, and for the first time extended the protection of the federal government to rights that might be invaded by state governments. This was a far cry from the time of the American Revolution, when the states had feared that the federal government would abuse and violate their rights.

The courts appeared to believe, in the years following Reconstruction, that the nation's wounds could only be healed by a revitalization of free enterprise in the economy. Only by giving the South a stake in the economy would there be hope that true Reconstruction could take place.

One result of this attitude was that there was rarely a significant ruling that went

The Fourteenth Amendment (1868) defined citizenship for the first time in U.S. history

Time and again, the Supreme Court ruled in favor of the states and against Negroes

against the interests of big business. And as a result, business in the post-war U.S. boomed.

Unfortunately, the civil rights of Negroes went in the opposite direction—from boom to bust. Time and again, the Supreme Court ruled in favor of the states and against individual Negroes on the issue of civil rights.

In 1882, for example, the Court heard a case that seemed to personify the extremes to which Negro rights were abused. The case involved several Negroes who had been taken from a sheriff's custody by an irate mob. The mob beat the Negroes savagely, and one of them died as a result of his injuries.

The federal government, which brought suit on behalf of the Negroes, argued that the state's failure to protect them was a blatant denial of their right to equal protection under the laws. But the Court thought otherwise, ruling that the state had not acted directly to deny the victims' rights. This kind of situation, said the Justices, was private, rather than state, action. It was regrettable that the state had failed to prevent the mob's formation and subsequent actions, but the state could not be held responsible for its failure under the Fourteenth Amendment.

A year later, the federal government tried again, this time combining five cases known as the Civil Rights Cases. All five involved alleged discrimination against Negroes in public accommodations. One of the Negroes had been denied a seat on a train, another a room in a hotel, a third a meal in a restaurant, and the other two seats in a theater and in the New York Grand Opera. The government argued that denial of these accommodations to the Negroes in question violated both the Thirteenth and Fourteenth Amendments.

Once again the Court disagreed. Not every act of discrimination could be interpreted as constituting slavery, said the Justices. Therefore, the cases in question did not violate the Thirteenth Amendment.

Regarding the alleged violations of the Fourteenth Amendment, the Court ruled that the discriminatory acts were private rather than state action and thus beyond the reach of the Amendment.

The decision also said that the 1875 Civil Rights Act, under which suit had been filed, was unconstitutional. Congress had gone beyond its power in drafting preventive legislation. The Court ruled that Congress could only draft remedial legislation.

In other words, said the Court, Congress could only pass laws designed to right specific wrongs—after they

had happened. It could not legally try to anticipate a wrong by making illegal things that had yet to come about. In the absence of direct action by the states, Congress was ruled powerless to act to preserve the rights of Negroes and other minority groups.

Justice John M. Harlan provided the only dissenting opinion in the Civil Rights Cases. Among other things, he said that the public facilities involved in the case had always been considered to serve important public functions. Proof of this was that they were licensed or otherwise regulated by the states. In a very true sense, said Justice Harlan, their acts were state action, and therefore could be regulated by Congress under the terms of the Fourteenth Amendment. But Justice Harlan was more than half a century before his time in this opinion, as events were to show.

The decision in the Civil Rights Cases dealt a serious blow to the high hopes for justice for Negroes that had been an earmark of Reconstruction. Taken together with other cases of the time, the decision effectively weakened the equal protection clause of the Fourteenth Amendment to the point where it seemed all but useless in the struggle for Negro civil rights.

But the most serious blow against Negro civil rights did not fall until 1896. It had to do with the violation of the rights of a Louisiana Negro under one of the early "Jim Crow" laws.

In 1890, the state of Louisiana passed a law requiring "separate but equal" accommodations for white and black passengers on railroads. Two years after passage of the law, a man named Homer Plessy, who was one-eighth Negro, decided to ride in the "Whites Only" car during a train ride from New Orleans to Covington, Louisiana. As a result, Plessy was arrested and tried under the 1890 law. He appealed his conviction to the Louisiana State Supreme Court, which ruled against him. Finally, he challenged the Louisiana law's constitutionality in an appeal to the U.S. Supreme Court.

Plessy argued that the law under which he had been tried was unconstitutional in that it violated the Thirteenth and Fourteenth Amendments. But the Court disagreed that there had been a violation of either Amendment.

First, the Justices dismissed outright Plessy's contention that the law violated the Thirteenth Amendment. There was, they said, no real evidence that the question of slavery was even remotely involved in the case at hand.

The real question, said the Court, was whether the

. . . the most serious blow against Negro civil rights did not fall until 1896

The doctrine of "separate but equal" facilities would last for nearly 60 years

object of the Fourteenth Amendment, to enforce the absolute equality of the races before the law, had been frustrated. By a vote of 8-to-1, the Court ruled that it had not.

Said Mr. Justice Brown, who wrote the majority opinion:

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put the construction upon it."

Justice Harlan once again supplied the Court's lone dissenting voice:

"In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . Our constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."

The Court's interpretation of the issues surrounding Homer Plessy's case amounted to the creation of the doctrine of "separate but equal" facilities for blacks and whites as being constitutionally correct. It was a doctrine that would last for nearly 60 years, until another Court in another time would take quite a different view of the situation.

In the meantime, civil rights for Negroes reached their lowest ebb since before the Civil War. What the various Court decisions in the last quarter of the 19th Century meant was that Negroes had virtually no recourse in protecting their rights other than the legislatures and courts of the states in which they lived. In a great many places throughout the nation, this meant, in effect, that they had few real rights at all.

The decades following the *Plessy* decision saw very little change in conditions for Negroes—at least as far as their civil rights were concerned.

The first crack in the "separate but equal" doctrine appeared four decades after Plessy's case had been decided. The Supreme Court ruled in 1938 that a Missouri Negro had a right to a professional education equal to that afforded whites in the same profession. Accordingly, the Court ordered the Negro admitted to an all-white law school of a state university—at least until an equal facility had been built for Negroes. Even though the state offered to finance the student's education at a school in another state, the Court ruled this out as less than equal treatment.

Other cracks in the "separate but equal" doctrine

were not long in coming. In the early 1940s, a Negro woman in Virginia was arrested for refusing to give up her seat to a white person on a bus trip from Virginia to Maryland. The route of the bus took it through the District of Columbia with Baltimore as the final destination. The woman was tried and convicted under a Virginia law requiring separate seating for Negroes and whites.

In her appeal to the U.S. Supreme Court, the woman challenged the constitutionality of the Virginia law. And the court agreed with her that the law was, indeed, unconstitutional. This time, however, the appeal centered on the need to protect interstate travel in the United States. It was purely a question of balancing local needs such as Virginia's against those of the entire country.

In 1950, the Court still operated under the *Plessy* doctrine of "separate but equal." In a case heard that year, the Justices ordered a Texas Negro admitted to the University of Texas law school. He had been excluded from the law school on the grounds of race. In addition, Texas had established a separate law school for Negroes. But the Court ruled that while the new school was separate, it was far from equal to white facilities in the state.

But even given this late application of the doctrine, it was held seriously in question by many members of the legal profession. Not least among them were the Justices of the Supreme Court.

In agreeing to hear a segregation case in 1954, the Justices reviewed how the "separate but equal" doctrine had worked in the various states in the years since the *Plessy* decision. They found that in the case of education, black children in the public schools had been denied the opportunity for an education equal to that received by white children.

The case in question, *Brown v. Board of Education of Topeka*, was, like the 1883 Civil Rights Cases, a number of cases presented as one. Parents of black children in Kansas, South Carolina, Virginia, and Delaware sought the help of the courts in gaining admission for their children to previously all-white schools.

In its decision, the Court ruled that segregation in education was detrimental to the interests of black children. Chief Justice Earl Warren, who wrote this historic opinion for the majority, reiterated the finding of the lower court:

"Segregation with the sanction of law . . . has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system. Whatever may have been the extent of

In 1954 the Court ruled that segregation in education was detrimental to black children

Through the protection of the courts and Congress, Negroes have continued to seek and obtain justice

psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."

Mr. Justice Warren also stated:

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the law guaranteed by the Fourteenth Amendment."

In addition to echoing the lonely dissents of Justice Harlan in the late 19th century, this decision paved the way for court action protecting Negro civil rights throughout the nation. That action, in the two decades since the decision, has covered virtually all areas of Negroes' social existence. The search for justice of the American Negro had taken a giant step forward.

Hand in hand with requests for relief from the courts was a spate of congressional activity, the first such activity since the days of Reconstruction, on behalf of Negro civil rights.

In 1957, Congress set up a Civil Rights Commission to investigate violations of Negro civil rights. The Civil Rights Act of 1960 desegregated the armed forces, provided safeguards for the voting rights of labor union members, and appointed voting referees to investigate alleged abuses against Negroes in the area of voting.

The Civil Rights Act of 1964 forbade different standards for voter qualifications between Negroes and whites. It also outlawed racial discrimination in public facilities and accommodations, and it prohibited racial discrimination by both unions and employers.

None of these laws addressed the question of literacy tests, all of them leaving the question of voter qualifications up to the individual states. As noted in the first section of this booklet, the Voting Rights Law of 1965 eliminated literacy tests and provided other safeguards for the Negro's right to vote.

Through the protection both of the courts and Congress, Negroes have continued to seek and obtain justice within our constitutional system of law.

In addition to the Negro's efforts to secure his civil rights, other minority groups throughout the United States have increasingly sought the equal protection of the laws guaranteed by the Fourteenth Amendment. Notable among them in recent years have been the struggle of Americans of Latin origin and, as recent history loudly attests, that of the American Indian.

Still to be faced: how to assist minorities in achieving equality with the majority

In the forefront of the struggle in this Bicentennial year have been women, whose efforts to achieve full equality with men are nearly as old as the republic. Perhaps not since the fight to achieve ratification of the Fourteenth Amendment has an Amendment to the Constitution—the Equal Rights Amendment—encountered such opposition in the nation.

The proposed 27th Amendment to the U.S. Constitution—the Equal Rights Amendment—says, in part

"Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

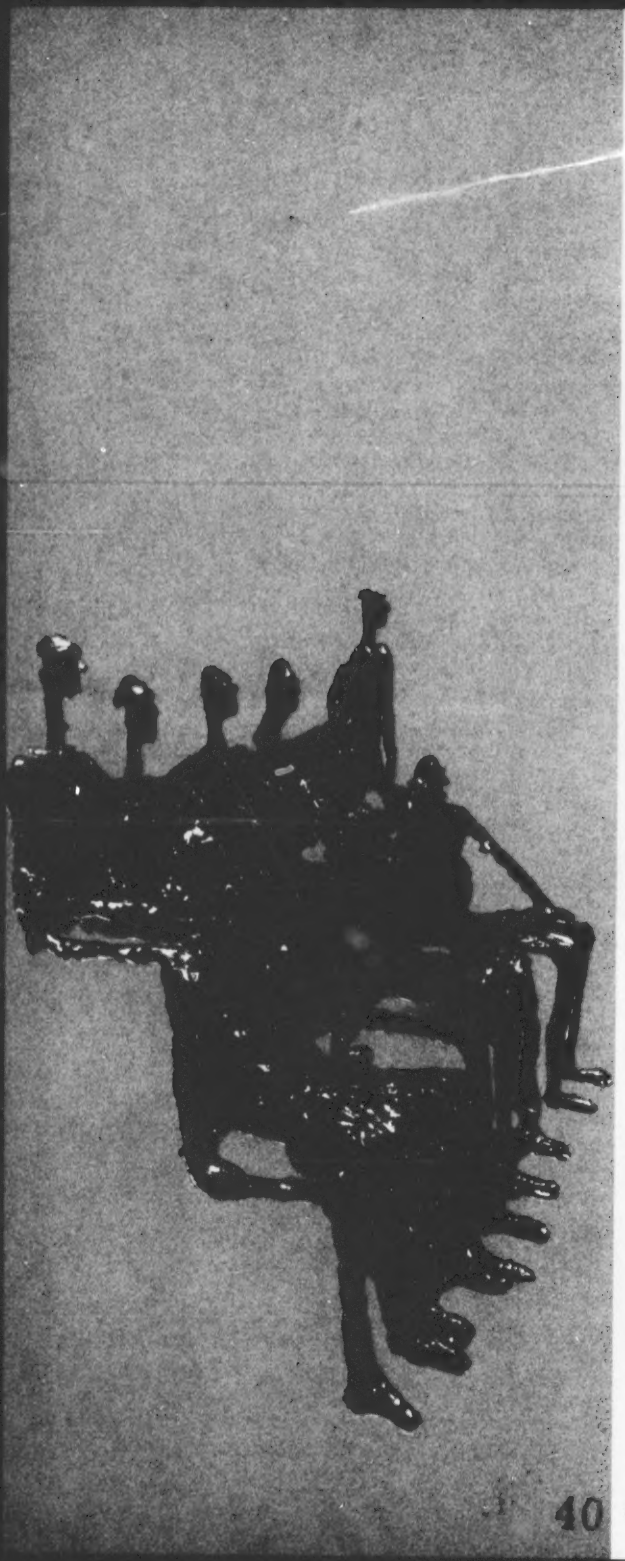
Is this amendment necessary or do existing laws sufficiently guarantee the rights of women? To what extent is the alleged discrimination against women the result of customs and traditions, rather than laws? If some of it is the results of custom and tradition, will it be affected by changes in the law or Constitution? List arguments for and against the Equal Rights Amendment.

The difficulty in applying this doctrine in individual cases, of course, lies in the interpretation of the nature and scope of "equal protection." Obviously, states may enact laws which contain reasonable classifications designed to accomplish a proper and lawful objective. At the same time, categorizations based on race, religion or national origin are suspect and may be unconstitutional unless a compelling state interest can be shown.

In a very true sense, however, what may prove to be the most difficult civil rights questions to be faced by our nation lie ahead of, not behind, us. Chief among these is the problem of the conflict between protection of the rights of the majority, and what is known as "affirmative action" to assist long-abused minorities in achieving equality with that majority.

At the core of this conflict are a number of disturbing questions. For example, if two equally qualified people—one black and one white—apply for the same job, should the black be hired over the white solely because of his race? What if the black is less qualified in terms of his education and experience? Can affirmative action justify a company passing over a qualified white with seniority for promotion—in order to promote a representative of a minority group with less time in the company?

What if a thousand or more students apply for admission to a law school and there are only 150 openings? Should a black student, though less qualified, be given preference over a white student in order to achieve racial balance in the law school class and promote greater minority representation in the field of law?



This last example has already been the subject of a struggle in the courts. In 1971, a student named Marco DeFunis applied to the law school of the University of Washington. DeFunis was denied admission to the school and petitioned a Washington trial court to force the school to admit him pending settlement of his suit in the courts. He claimed that the admissions criteria of the law school violated his rights under the Equal Protection Clause of the Fourteenth Amendment.

The court agreed with DeFunis and ordered the school to admit him to his first year in the fall of 1971. An appeal by the school to the Washington Supreme Court resulted in the trial court's order being reversed. But by the time the Court handed down its decision, DeFunis was in his second year of law school.

He immediately appealed to the United States Supreme Court to give his case a speedy hearing. The Court agreed to do so in order to resolve the question of Marco's status in the school. While his case was pending, he was allowed to remain a student.

By the time the Court heard DeFunis's case, he was in his third and final year. In a narrow 5-to-4 decision, the Court ruled that since DeFunis was about to graduate from law school, his case was moot

(which, in this context, means that there is no longer any outstanding issue between the parties in this case) and declined to render a decision.

Speaking for the four-man minority which wanted to adjudicate the case, Justice Douglas scolded the Court for doing a disservice to the public by "disposing of this case as moot. Few constitutional questions in recent history have stirred as much debate, and they will not disappear." Douglas went on to provide some interesting insights into the issue. He stated that the Equal Protection Clause "commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized . . . the school did not choose one set of criteria but two and then determined which to apply to a given applicant on the basis of race. . ." Douglas suggested that applicants should be considered in what he termed "a racially neutral way." Therefore, while affirmative action programs may be acceptable under the Equal Protection Clause, they may well be found invalid if they are based solely on race. Other factors, such as cultural, sociological and economic backgrounds must also be taken into account.

While no one knows what factors most influenced the Justices who declined to render judgment in the case, it has been suggested that they may have felt that an issue of this importance and complexity should not be decided by the courts but by the people's representatives. Perhaps Congress or individual state legislatures should either prohibit or permit affirmative action programs, and if they are to be permitted, the legislature should provide explicit guidelines for such programs. If legislative bodies considered this matter, there would be ample opportunity for the people to express their views on these troublesome questions. Legislators would thereby be able to find out what their constituents thought, and get a sense of the popular will. Or the Court may have thought that it was best to leave this problem to the good faith efforts and solutions of colleges and universities across the nation. Thus many experiments could be attempted and perhaps in a few years one or more useful answers found to this dilemma.

Should a university have the right to establish different admissions standards on the basis of race, nationality or other factors in order to increase minority representation in the school? If so, how can we justify what appears to be a form of discrimination? Are there other ways that universities have previously discriminated among applicants?

"The tolerable accommodation of the conflicting interests of society."

Learned Hand—Former Judge, U.S. Court of Appeals for the Second Circuit

Conclusion

These are but a few brief examples of the search for justice in America. We have seen that the search for justice is very often a slow and difficult process. Some individuals described in this pamphlet, such as Dred Scott, failed in the search. Others, such as Sam Sheppard, won ultimate vindication only after years of imprisonment and a long and costly struggle. Their efforts, however, ultimately contributed towards insuring greater justice for all Americans.

And so the search for justice continues. In each of the areas discussed in this book, we have seen how our system of justice has made enormous strides over the years. More of our citizens now have the right to vote; those accused of crimes are assured of greater constitutional protection; fewer feel the sting of discrimination.

But the search for justice is far from over. A large number of extremely difficult and complex issues still face our nation. There is often no clear solution to these problems. What one may perceive as just, another may regard as unjust. Since men and women are less than perfect, we will never achieve perfect justice. We must, however, remain determined to continue our search. In this way, we will have contributed to making America's third century a little better, a little more just.

A pamphlet examining the efforts of our forefathers to secure justice for the American colonists and future generations of Americans and the evolution of this search throughout American history in four major areas: the right to vote, the rights of freedom of expression and freedom of the press, the rights of persons accused of crimes, and the right to equal protection of the laws. Recommended for use by junior and senior high school students and adults.